

## KEYNOTE ADDRESS

### The Bill of Rights: A Century of Progress

*John Paul Stevens*<sup>†</sup>

In an otherwise mundane tax opinion construing language in the Internal Revenue Code, Oliver Wendell Holmes observed that “a word . . . is the skin of a living thought.”<sup>1</sup> As the years pass, an idea may mature, changing its shape, its power, and its complexion, even while the symbols that identify it remain constant. There is a special vitality in words like “commerce,” “equality,” and “liberty.”

In southwestern England, the huge sarsen pillars that primitive astronomers erected and arranged at Stonehenge centuries ago convey a profound message about man’s ability to reason and to create. Even though the intent of the framers of Stonehenge is shrouded in mystery and obscurity, their message is nevertheless majestic and inspiring. Only a few miles away, the highest church spire in England, the Salisbury Cathedral, stands as a symbol of the creativity, the industry, and the faith of the Christian architects and engineers of the thirteenth century. A visitor to that cathedral may view one of the four remaining copies of a famous document that was signed at Runnymede early in that century.

The message to be found in the text of the Magna Carta is neither clear nor unambiguous because its language is not plain and its style and lettering are unfamiliar. It is, nevertheless, an im-

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<sup>†</sup> Associate Justice, Supreme Court of the United States. This Article is the text of the keynote address delivered on October 25, 1991 at *The Bill of Rights in the Welfare State: A Bicentennial Symposium*, held at The University of Chicago Law School on October 25-26, 1991. I am indebted to Nancy Marder, not only for her valuable work as a law clerk for the past year, but also for supplying the footnotes and editing the text of these remarks.

<sup>1</sup> *Towne v Eisner*, 245 US 418, 425 (1918).

portant symbol because it constitutes evidence that a once powerful ruler, King John, promised a group of his subjects that the occupant of the throne of England would thereafter obey "the law of the land."<sup>2</sup>

The significance of King John's promise has been anything but constant. In the two centuries after it was made, one English king after another deposed his predecessor by means that violated the law of the land. Although Henry VII was crowned after his victory at the Battle of Bosworth on August 22, 1485, he established August 21 as the date when he had become king, thus retroactively condemning his former adversaries as traitors because they had fought to defend the then-recognized occupant of the throne.<sup>3</sup> In the late sixteenth century, when the greatest author of all time dramatized the life of King John, he did not even mention the Magna Carta.<sup>4</sup> Today, at least in America, the reign of King John is remembered because of that document. In Elizabethan England, however, that great symbol had either been forgotten, or at least was not viewed with any special favor by the most popular spokesman for the establishment.

## I.

Today we focus our attention on another great symbol—a promise made 200 years ago that the newly-created federal sovereign would obey the law in this land. That promise has surely not been forgotten, but its meaning has changed dramatically during the two centuries of its life. To emphasize the importance and the character of that change, I have entitled my remarks: *The Bill of Rights: A Century of Progress*. Because you may wonder why I refer to only one century, and why I refer to "progress," I shall begin with a comment on my title.

This important conference is a tribute to Chicago and to this great university. I am proud to be one of its graduates and to have taught briefly in its law school. The University of Chicago is now 100 years old. Its participation in the development of American education—and more particularly legal education—unquestionably

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<sup>2</sup> "By that instrument, the King, representing the sovereignty of the nation, pledged that 'no freeman shall be taken, or imprisoned, or be disseized of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we [not] pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land.'" *Hurtado v California*, 110 US 516, 542 (1884).

<sup>3</sup> Rosemary Horrox, *Richard III* 317, 327 (Cambridge, 1989); S. B. Chrimes, *Henry VII* 50, 63 (California, 1972); Thomas B. Costain, *The Last Plantagenets* 384 (Doubleday, 1962).

<sup>4</sup> William Shakespeare, *King John* (Bantam, 1988).

merits characterization as “A Century of Progress.” Just two years after the founding of the University, the Midway which adjoins this campus was the location of the famous amusement park in the 1893 World’s Fair where Little Egypt became famous for her erotic dancing. Forty years later, in 1933, the City of Chicago celebrated its 100th anniversary by sponsoring another enormously successful World’s Fair, which also brought fame to a nude dancer named Sally Rand. Whether the First Amendment protects performances like Rand’s is a question that two illustrious Chicago professors, who also wear judicial robes, recently debated in a case that I believe was correctly decided by the Court of Appeals for the Seventh Circuit<sup>5</sup> and incorrectly decided by a confused and fractured majority of the Supreme Court of the United States.<sup>6</sup>

1933 was a year in which this city—indeed the entire western world—was in the throes of a severe economic depression. Adolf Hitler came to power in 1933 and book-burning became fashionable in Nazi Germany. Chicago was then known throughout the world as the home of Al Capone, the master of organized crime who had made millions during the federal government’s war on alcoholic beverages. At that time, less prosperous criminals were sometimes treated brutally by Chicago police officers seeking confessions of guilt.<sup>7</sup> 1933 was the year in which the city’s mayor was killed in an attempt to assassinate President Roosevelt. Before the Fair opened, there were many reasons to be pessimistic about Chicago. Nevertheless, the Fair was appropriately given a name that focused on the positive and inspired Chicagoans to build for a glorious future. The Fair was named “A Century of Progress.”

My selection of a title for this address reflects more than a nostalgic memory of that World’s Fair. It was motivated, in part, by the fact that 1991 is a year in which an occasional echo of 1933 has sounded an alarming note. A volatile stock market, an ever-escalating deficit, and disturbing reports of mismanagement of major financial institutions remind us that in 1991—as in 1933—risk

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<sup>5</sup> *Miller v Civil City of South Bend*, 904 F2d 1081, 1089 (7th Cir 1990) (en banc); (Posner concurring in the opinion and judgment of the court) (dance is expressive and therefore should be protected under the First Amendment); id at 1120 (Easterbrook dissenting) (Indiana law regulates public nudity, which is conduct, not speech, and therefore does not violate the First Amendment).

<sup>6</sup> *Barnes v Glen Theatre, Inc.*, 111 S Ct 2456 (1991) (statute requiring dancers to wear pasties and G-strings does not violate First Amendment). *Barnes* was a 5-4 decision, in which Chief Justice Rehnquist was joined by Justice O’Connor and Justice Kennedy. Justice Scalia and Justice Souter each filed separate opinions concurring in the judgment.

<sup>7</sup> See, for example, *People v LaFrana*, 4 Ill 2d 261, 265, 122 NE2d 583 (1954).

is a characteristic of a free economy. The stagnation of the Soviet economy—reminiscent of Germany in 1933—furnished the setting for the attempted coup by the KGB and the military that for a brief moment produced frightening memories of Hitler's rise to power and the ruthless behavior of his Gestapo. In Great Britain, 1991 is a year in which the re-examination of the convictions of alleged Irish terrorists has reminded us that trusted police officers sometimes fabricate confessions to obtain convictions.<sup>8</sup>

In this country, while dozens of universities and communities throughout the land are celebrating the bicentennial of the Bill of Rights, an extraordinarily aggressive Supreme Court has reached out to announce a host of new rules narrowing the federal Constitution's protection of individual liberties. The prosecutor's use of a coerced confession—no matter how vicious the police conduct may have been—may now constitute harmless error.<sup>9</sup> In a totally un-

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<sup>8</sup> *Regina v McKenny*, 141 NLJ 456 (1991) (police fabricated confessions and relied on faulty forensic tests in case of alleged Irish Republican Army (IRA) terrorists known as the Birmingham Six). Earlier, in 1989, it also came to light that the police had fabricated interview notes to secure the conviction of other alleged IRA terrorists known as the Guildford Four. See *Regina v Richardson*, *The Times* (London) 33J (Oct 20, 1989).

These and similar cases have "badly shaken" the British courts, and have led the government to set up a Royal Commission to study the criminal justice system in order "to minimize as far as possible the likelihood of such events happening again." William E. Schmidt, *British Court to Review 1974 Bombing Case*, *NY Times* A4 (Sep 18, 1991). The ten-person commission, whose members include prominent academics, journalists, and businessmen, represent "a wide range of experience." Jonathan Ames, *Commission Line-up Welcomed*, 88 *Law Society's Guardian Gazette* 4 (May 22, 1991). The commission will examine "all stages of the criminal process" and will consider "the investigation and pre-trial process including the conduct of the police investigations and their supervision, the right to silence, the role of the prosecutor in obtaining evidence and deciding whether to proceed with a case and arrangements for disclosing material to the defence." Marion McKeone, *Lawyers Urge Interim Criminal Justice Reforms*, 88 *Law Society's Gazette* 7 (Mar 20, 1991). The goal of the commission is nothing short of reform of the criminal justice system.

<sup>9</sup> *Arizona v Fulminante*, 111 S Ct 1246 (1991). The Supreme Court affirmed the judgment of the Arizona Supreme Court, which had held that Fulminante's confessions were coerced and that harmless error analysis did not apply. On the one hand, three of the four members of the Court who voted to reverse concluded that no error had occurred because the confessions were not coerced; accordingly, they had no need to reach the harmless error issue. On the other hand, because it was clear to the five members of the majority who voted to affirm that the introduction of the confessions had not been harmless, there was no need for them to re-examine the settled rule that the use of a coerced confession requires automatic reversal. Only the vote of Justice Scalia, who agreed that the confessions were coerced but thought that their admission was harmless, depended on the answer to the question whether harmless error analysis applies to coerced confessions.

As a result of the Court's decision in *Fulminante*, state supreme courts must now look to their state constitutions to hold that "a coerced confession may so infect the trial process that its admission into evidence demands reversal" and that the admission of a coerced confession is not subject to harmless error analysis. *Iowa v Quintero*, 60 *USLW* 2165 (Iowa Ct App, Sep 17, 1991) (en banc).

necessary and unprecedented decision, the Court placed its stamp of approval on the use of victim impact evidence to facilitate the imposition of the death penalty.<sup>10</sup> The Court condoned the use of mandatory sentences that are manifestly and grossly disproportionate to the moral guilt of the offender.<sup>11</sup> It broadened the powers of the police to invade the privacy of individual citizens,<sup>12</sup> and even to detain them without any finding of probable cause<sup>13</sup> or reasonable suspicion.<sup>14</sup> In perhaps its most blatant exercise of law-making power marching under the banner of federalism, the Court completely rewrote the procedural rules governing post-conviction

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<sup>10</sup> *Payne v Tennessee*, 111 S Ct 2597 (1991). Here, as in *Fulminante*, the Court reached out to address an issue that it need not have considered. In *Payne*, the Court ordered the parties to brief and argue whether *Booth v Maryland*, 482 US 496 (1987), and *South Carolina v Gathers*, 490 US 805 (1989), should be overruled. 111 S Ct 1407 (1991). As the Court's order indicates, this was an issue that was not even raised in the petition for certiorari. See Pet for Cert 3. The Court need not have revisited *Booth* and *Gathers* in any event because the Tennessee Supreme Court had held that there was no *Booth* violation, and as an alternative ground, that even if there had been a *Booth* violation, it was harmless beyond a reasonable doubt. See *State v Payne*, 791 SW2d 10, 18-19 (Tenn 1990).

<sup>11</sup> *Harmelin v Michigan*, 111 S Ct 2680 (1991) (upholding mandatory life sentence without possibility of parole for possession of 672 grams of cocaine). Relying on the plain language of the Eighth Amendment and a scholarly examination of historical evidence concerning the intent of the Framers, Justice Scalia argued that proportionality should not even be considered in construing the constitutional prohibition against "cruel and unusual punishments." Significantly, seven members of the Court refused to adopt an argument that was clearly at odds with the Court's prior Eighth Amendment jurisprudence. See, for example, *Weems v United States*, 217 US 349 (1910); *Gregg v Georgia*, 428 US 153 (1976); *Coker v Georgia*, 433 US 584 (1977); *Enmund v Florida*, 458 US 782 (1982); *Solem v Helm*, 463 US 277 (1983).

In *Chapman v United States*, 111 S Ct 1919 (1991), the Court construed a statute to authorize grossly disparate sentencing. The statute required a five-year minimum sentence for distributing more than one gram of a "mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD)." The Court held that it is the weight of the LSD and the "carrier" containing it, and not the weight of the pure LSD, that determines eligibility for the minimum sentence. Under the Court's construction of the statute, a person distributing 1,000 doses of LSD in liquid form is subject to no minimum penalty, whereas a person handing another person a single dose on a sugar cube, which weighs about two grams, is subject to a mandatory five-year penalty. *Id* at 1931 n 9 (Stevens dissenting).

<sup>12</sup> In *California v Acevedo*, 111 S Ct 1982 (1991), the Supreme Court overruled *Arkansas v Sanders*, 442 US 753 (1979), and held that the police may search a closed container in an automobile even though they do not have a search warrant, as long as they have probable cause to believe the container contains contraband. See also *Florida v Jimeno*, 111 S Ct 1801 (1991) (consent to search car includes consent to search any closed containers found in car).

<sup>13</sup> *County of Riverside v McLaughlin*, 111 S Ct 1661 (1991) (Fourth Amendment permits individual to be detained for 48 hours without probable cause hearing).

<sup>14</sup> *California v Hodari D.*, 111 S Ct 1547 (1991) (individual was not "seized" within the meaning of the Fourth Amendment when police officer pursued and ran toward him without reasonable suspicion); *Florida v Bostick*, 111 S Ct 2382 (1991) (Fourth Amendment does not prohibit police officers from boarding bus and searching passengers, even though officers lack reasonable suspicion to conduct such a search, if passengers "consent" to search).

proceedings to foreclose judicial review of even meritorious constitutional claims in capital cases.<sup>15</sup> An attorney's untimely filing of a notice of appeal from a state court's refusal to grant post-conviction relief—a negligent misstep that until this year merely would have foreclosed appellate review in the state's judicial system—now bars federal review of a claim that imposition of the death sentence on the attorney's client violated the Bill of Rights.<sup>16</sup>

Although the Court's extraordinarily disappointing performance in 1991 can only have a sobering influence on bicentennial celebrations such as this, the work product of a single term must be viewed from a broader perspective. Even while American judges are depreciating the value of liberty, this is a time when—thanks largely to the vision of Mikhail Gorbachev, and perhaps to the symbolic power of documents like the Bill of Rights—the voices of freedom have produced the beautiful music of debate, controversy, and progress in most of Eastern Europe. Perhaps, in time, the free exchange of ideas in other parts of the world will give Americans the incentive and the courage to re-examine the reasons why our prison population—and particularly the number of inmates on death row<sup>17</sup>—steadily expands at an alarming rate<sup>18</sup> while armed conflict in the streets of our cities continues to flourish.

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<sup>15</sup> *Coleman v Thompson*, 111 S Ct 2546 (1991); *Ylst v Nunnemaker*, 111 S Ct 2590 (1991); *McCleskey v Zant*, 111 S Ct 1454 (1991).

<sup>16</sup> *Coleman*, 111 S Ct at 2566-67.

<sup>17</sup> Department of Justice figures indicate that as of December 31, 1980 there were 714 prisoners under sentence of death in the United States, and as of December 31, 1989 there were 2,250 prisoners under sentence of death. US Department of Justice, Bureau of Justice Statistics, *Capital Punishment 1980* 1 (1981); US Department of Justice, Bureau of Justice Statistics, *Capital Punishment 1989* 6 (1990). In less than a decade, the total number of prisoners under sentence of death in the United States has increased by 215%. According to Bureau of Justice Statistics Director Steven Dillingham, since 1976 there have been 3,834 people sentenced to death. *40% on Death Row Are Black, New Figures Show*, NY Times A15 (Sep 30, 1991).

<sup>18</sup> In the 1980s, the United States' prison population doubled, whereas during the same time period in the Soviet Union, the prison population declined and in South Africa, the prison population increased by only 11%. Marc Mauer, *Americans Behind Bars: A Comparison of International Rates of Incarceration* 6 (The Sentencing Project, 1991); Ronald J. Ostrow, *U.S. Imprisons Black Men at 4 Times S. Africa's Rate*, LA Times A1 (Jan 5, 1991). The United States "now has the world's highest known rate of incarceration"; it imprisons 426 people per 100,000 population, whereas the Soviet Union imprisons 268 per 100,000 population and South Africa imprisons 333 per 100,000 population. Mauer, *Americans Behind Bars* at 3-5. In comparison, incarceration rates in Western Europe range from 35 to 120 per 100,000 population, and rates in Asia range from 21 to 140 per 100,000 population. *Id.* For example, the United States' incarceration rate is almost ten times that of Japan's. See *id.* at 5.

The broader perspective from which the Supreme Court's recent decisions should be viewed is temporal as well as geographic. My topic is intended to suggest that it is appropriate to consider the significance of the Bill of Rights during an entire century and, more particularly, to determine whether that century of jurisprudence represents legitimate progress.

## II.

Prior to the Civil War and the subsequent adoption of the Fourteenth Amendment, the Bill of Rights was merely a limitation on the power of the federal government.<sup>19</sup> Arguably, the first ten amendments were redundant because they did little more than identify some of the outer boundaries of the powers that the original Constitution conferred on the federal sovereign.<sup>20</sup> In the first century of its existence, the Bill of Rights was, in some respects, comparable to the Magna Carta—a relatively static symbol expressing the general idea that the federal government has an obligation to obey the law of the land.

In the second century of its life, however, the Bill of Rights became a dynamic force in the development of American law. The United States Supreme Court played a major role in that development. Its liberal—one might say “activist”—interpretation of the word “commerce” in Article I of the Constitution created the gateway to a vast expansion of the federal government's power to regulate the lives of individual citizens.<sup>21</sup> Increased federal regulation,

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<sup>19</sup> *Barron v Baltimore*, 32 US (7 Pet) 242, 247 (1833) (holding first eight amendments inapplicable to the states); see also *Withers v Buckley*, 61 US (20 How) 84, 90-91 (1857).

<sup>20</sup> “I go further, and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous . . . . For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?” Federalist 84 (Hamilton) in Benjamin Fletcher Wright, ed, *The Federalist Papers* 531, 535 (Harvard, 1961).

<sup>21</sup> See, for example, *Houston and Texas Railway v United States*, 234 US 342, 351 (1914) (power of Congress to regulate rates of interstate railroads includes power “to control . . . all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance”); *Wickard v Filburn*, 317 US 111, 127-28 (1942) (Congress could control farmer's production of wheat for home consumption because cumulative effect of home consumption of wheat by many farmers would affect supply and demand relations of interstate commodity market); *Heart of Atlanta Motel, Inc. v United States*, 379 US 241, 258 (1964) (“Congress may . . . prohibit racial discrimination by motels serving travelers, however ‘local’ their operations may appear”); *Perez v United States*, 402 US 146, 154 (1971) (“[e]xtortionate credit transactions,

as well as federal participation in criminal law enforcement, inevitably gave rise to individual claims that the federal sovereign was invading territory protected by the Bill of Rights. Of even greater significance was the Supreme Court's determination that the basic concepts described in the Bill of Rights are incorporated in the Fourteenth Amendment's guarantee that no state may deprive any person of liberty without due process of law. This construction of the Due Process Clause, or as I prefer to call it, the Liberty Clause, in the Fourteenth Amendment has transformed the Bill of Rights from a mere constraint on federal power into a source of federal authority to constrain state power.

In this century, most of the significant cases raising Bill of Rights issues have, in the final analysis, actually interpreted the word "liberty" in the Fourteenth Amendment. Indeed, the impact of that Amendment on the Bill of Rights has also led to an expansion of the meaning of the word "liberty" as it is used in the Fifth Amendment. When the Court held that the racial segregation of students in the public schools in Topeka, Kansas, violated the Equal Protection Clause,<sup>22</sup> simple justice indicated that the same rule should obtain in the federal enclave known as the District of Columbia. Unable to rely on the Equal Protection Clause because it applies only to state action, the Court unanimously found what is now known as the equal protection component of the Due Process Clause embedded in the word "liberty" as it is used in the Fifth Amendment.<sup>23</sup> Thus, through the process of judicial construction, the Bill of Rights has become a shield against invidious discrimination by the federal government as well as a shield against the misuse of state power.

The judiciary's reconstruction of the term "commerce" during this century is generally accepted as legitimate by even the most conservative critics of the Supreme Court's work product. Respected scholars have, however, questioned the legitimacy of the Court's doctrine incorporating portions of the Bill of Rights into the Liberty Clause of the Fourteenth Amendment as well as the decisions incorporating the idea of equality into the Liberty Clause

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though purely intrastate, may in the judgment of Congress affect interstate commerce"). These cases stand in stark contrast to some of the Supreme Court's earlier cases, such as *United States v E.C. Knight Co.*, 156 US 1, 13 (1895), in which the Supreme Court "allowed but little scope to the power of Congress." *Wickard*, 317 US at 121-22.

<sup>22</sup> *Brown v Board of Education*, 347 US 483 (1954).

<sup>23</sup> *Bolling v Sharpe*, 347 US 497 (1954).



of the Fifth Amendment.<sup>24</sup> Because the Fifth Amendment has been a part of the Bill of Rights throughout its 200-year history, it is appropriate to say a few words about the latter criticism before discussing the broader question of incorporation.

A.

If the task of judicial construction began and ended with a grammatical and etymological analysis of legal text, or even if it were slightly expanded to include an analysis of the original intent of those who drafted and enacted that text into positive law, one would expect an impartial court to reject any claim that the word "liberty," as used in the 1791 Constitution, endorsed the revolutionary idea that all men are created equal. For the text of the Constitution in 1791, before as well as after the ratification of the Bill of Rights, expressly approved of invidious discrimination. Article IV provided positive protection for the institution of slavery<sup>25</sup> and Article I provided that for the purpose of apportioning congressional representatives, each slave should be counted as three-fifths of a person.<sup>26</sup> The interest in protecting individual freedom that animated the adoption of the Bill of Rights left these odious portions of the original Constitution untouched. The Framers had constructed a document that, like the fledgling nation itself, could be described as a house divided against itself—an institution that was half slave and half free. A Constitution that expressly tolerated the worst kind of discrimination could not simultaneously condemn all irrational discrimination.

Those who argue that the meaning of the word liberty as used in the Bill of Rights is the same today as it was in 1791 correctly point out that the draftsmen of the Equal Protection Clause of the Fourteenth Amendment proposed no parallel provision to expand the coverage of the Liberty Clause of the Fifth Amendment. Be-

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<sup>24</sup> See Raoul Berger, *Activist Censures of Robert Bork*, 85 Nw U L Rev 993, 1015 (1991); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 32-33 (Harvard, 1980).

<sup>25</sup> "No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due." US Const, Art IV, § 2, cl 3.

<sup>26</sup> "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons." US Const, Art I, § 2, cl 3 (superseded by § 2 of the Fourteenth Amendment).

cause the text of the 1791 Amendment has not been changed, they assume that we should simply ignore other changes in our fundamental law in the process of construing that text today. The logic of that straightforward argument leads to the conclusion that the unanimous decision of the Supreme Court in *Bolling v Sharpe*<sup>27</sup> simply was wrong and that—as some critics suggest—the Justices had arrogantly assumed a lawmaking role to implement their own notions of wise social policy.

Notwithstanding the force of this hybrid plain language-original intent argument, the judicial recognition of the Equal Protection component of the Liberty Clause of the Fifth Amendment is so well-settled<sup>28</sup> that judicial opinions need not contain an explanation of the legitimacy of the rule. In a symposium such as this, however, it is appropriate to explain why the rule is firmly grounded in our law for reasons that are even stronger than the doctrine of stare decisis.

Just as the task of statutory construction requires a judge to examine the entire text of the relevant statute in order to understand the meaning of the provision in dispute, so does constitutional interpretation often involve a study of interrelated provisions. The changes in constitutional text that were effected by the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments breathed new life into the entire document. The purge of

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<sup>27</sup> 347 US 497 (1954) (racial segregation in District of Columbia public schools was denial of Fifth Amendment right to due process).

<sup>28</sup> See, for example, *Califano v Webster*, 430 US 313, 317 (1977) (per curiam) (holding constitutional under Fifth Amendment federal social security statute treating female wage earners more favorably than male wage earners to redress "our society's longstanding disparate treatment of women"); *Califano v Goldfarb*, 430 US 199, 201 (1977) (federal statute denying survivors' benefits to female wage earner's spouse unless he can show he "was receiving at least one-half of his support" from his deceased wife, but not requiring male wage earner's surviving spouse to make the same showing of dependency, violates Due Process Clause of Fifth Amendment); *United States Dept. of Agriculture v Moreno*, 413 US 528 (1973) (food stamp statute excluding any household containing individual unrelated to any other member of the household violates Due Process Clause of Fifth Amendment); *Frontiero v Richardson*, 411 US 677, 680 (1973) (holding unconstitutional under Fifth Amendment federal statutes providing that spouses of male members of the armed services were "dependents" for purposes of military benefits, but that spouses of female members were not unless they depended on their wives for more than one-half of their support); *Shapiro v Thompson*, 394 US 618, 641-42 (1969) (holding unconstitutional state and federal provisions denying welfare benefits to individuals who had resided in the administering jurisdiction less than one year); *Schneider v Rusk*, 377 US 163, 168 (1964) (holding unconstitutional a statute treating naturalized citizens as less reliable than native born citizens because "while the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process'") (quoting *Bolling*, 347 US at 499).

the odious provisions that infected the 1791 text made it appropriate in the post-Civil War period to give the word "liberty" its ordinary meaning—indeed, a meaning that is not only acceptable to today's judges but one that presumably would have been acceptable to an eighteenth-century jurist if the original Constitution had not contained those odious provisions. As the Court noted in *Bolling v Sharpe*, it has not defined the word "liberty" with any great precision, though it has often made clear that the concept encompasses more than a freedom from bodily restraint.<sup>29</sup> Whether the concept is broad enough to encompass the idea of equality is a question that is easily answered by reference to the standard articulated by Justice Holmes in his *Lochner* dissent: Is it a matter of fundamental principle that has been so "understood by the traditions of our people and our law?"<sup>30</sup>

Perhaps the most articulate authority on those traditions was a lawyer named Abraham Lincoln. He unquestionably would have agreed with the Court's conclusion that "liberty" includes a right to equal treatment under the law. For in his address calling for "a new birth of freedom,"<sup>31</sup> he identified the direct connection between the idea of liberty that was to prevail when General Lee ordered the Confederate Army to retreat from Gettysburg on July 4, 1863, and the idea of liberty that had prevailed when the Declaration of Independence was signed on July 4, 1776. Lincoln's calculation of "four score and seven years"<sup>32</sup> as the interval between his dedication at Gettysburg and the birth of the nation identifies the Declaration of Independence, rather than the Constitution or the Bill of Rights, as the source of his understanding of the term "liberty." The self-evident proposition enshrined in the Declaration—the proposition that all men are created equal—is not merely an aspect of social policy that judges are free to accept or

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<sup>29</sup> 347 US at 499.

<sup>30</sup> "I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said . . . that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law." *Lochner v New York*, 198 US 45, 76 (1905) (Holmes dissenting).

This standard has been incorporated into subsequent cases as well. See, for example, *Snyder v Massachusetts*, 291 US 97, 105 (1934) (Cardozo) (state is free to regulate its procedure "unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental"); *Moore v City of East Cleveland*, 431 US 494, 503 (1977) (plurality opinion) (the Constitution protects the family "precisely because the institution of the family is deeply rooted in this nation's history and tradition").

<sup>31</sup> Abraham Lincoln, *Gettysburg Address* (Nov 19, 1863), in Henry Steele Commager, ed., *1 Documents of American History* 429 (Appleton-Century-Crofts, 9th ed 1958).

<sup>32</sup> *Id* at 428.

reject; it is a matter of principle that is so firmly grounded in the "traditions of our people" that it is properly viewed as a component of the liberty protected by the Fifth Amendment. The positive command expressed in the Bill of Rights that the federal sovereign must obey the law of the land unquestionably requires federal judges to respect the proposition to which the forefathers dedicated the founding of the nation itself.

## B.

The text of the Liberty Clause of the Fourteenth Amendment, which provides that no state shall "deprive any person of life, liberty, or property, without due process of law,"<sup>33</sup> offers a different basis for criticizing the Supreme Court's decisions applying provisions of the Bill of Rights to the actions of the sovereign states.<sup>34</sup> As is true of the Fifth Amendment, a literal reading of that clause provides the individual with a guarantee of fair procedure before the state may deprive him of life, liberty, or property, but it does not impose any constraint on the kinds of deprivations the state may impose on its citizens. Moreover, the general requirement that there must be "due process"—which appears in both the Fifth and the Fourteenth Amendments—arguably should not encompass such specific guarantees as the right to a speedy trial, the right to counsel, or the right to compulsory process because the Sixth Amendment would be redundant if those rights were already protected by the Fifth Amendment's general guarantee of due process.<sup>35</sup> The Supreme Court nevertheless has concluded in a long and unbroken line of cases that the Due Process Clause of the Fourteenth Amendment does require the states not only to comply with specific procedural protections in the Bill of Rights, but also

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<sup>33</sup> US Const, Amend XIV, § 1.

<sup>34</sup> "The words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in *Magna Charta*." *Murray's Lessees v Hoboken Land and Improvement Co.*, 59 US (18 How) 272, 276 (1856). In *Davidson v New Orleans*, 96 US (6 Otto) 97, 101 (1877), the Supreme Court recognized that one was the equivalent of the other. See also Joseph Story, 3 *Commentaries on the Constitution of the United States* §§ 931-32 (Carolina Academic, 1987) (originally published, Hilliard Gray, 1833). Learned Hand reached the same conclusion: "It is my understanding that the 'Due Process Clause,' when it first appeared in Chapter III of the 28th of Edward III—about a century and a half after *Magna Carta*—was a substitute for, and was regarded as the equivalent of, the phrase, *per legem terrae*, which meant no more than customary legal procedure." Learned Hand, *The Bill of Rights* 35 (Harvard, 1958).

<sup>35</sup> This, in essence, is the argument that the Court accepted to explain its conclusion that due process of law does not require an indictment by a grand jury as a prerequisite to a prosecution for murder. See *Hurtado*, 110 US at 534-35.

to respect certain substantive guarantees. The Court's interpretation of that clause makes some state action entirely invalid regardless of the procedures the state may employ in enforcing its command.

The most striking evidence of the Court's willingness to ignore the literal meaning of constitutional text is provided by cases preventing the states from abridging the freedoms protected by the First Amendment. The text of that Amendment provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.<sup>36</sup>

A judge who strictly construes that text must find it difficult to understand how it limits the power of any governmental body other than the Congress of the United States. Even when the First Amendment is read in the light of the Fourteenth Amendment's command that states may not deprive anyone of liberty without due process of law, the puzzlement remains. To find the solution it is necessary to search judicial opinions.

Although the earliest opinions endorsing the proposition that the federal Constitution protects speech and associational freedom from state action were written by two of our greatest Justices—Justice Holmes and Justice Brandeis—neither of them bothered to quote any part of the text of the First Amendment to support that proposition. In his dissent in *Gitlow v New York*, Justice Holmes merely asserted: "The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word 'liberty' as there used . . . ."<sup>37</sup>

Two years later, in his separate opinion in *Whitney v California*,<sup>38</sup> Justice Brandeis expressly endorsed the conclusion that the Due Process Clause of the Fourteenth Amendment provides sub-

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<sup>36</sup> US Const., Amend. I.

<sup>37</sup> 268 US at 652, 672 (1925) (Holmes dissenting). The majority did not disagree with this proposition. It wrote:

For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States.

268 US at 666.

<sup>38</sup> 274 US 357, 372 (1927) (Brandeis concurring).

stantive as well as procedural protection and also the proposition that the term liberty embraces the right of free speech. I quote two sentences from his opinion to emphasize the non-textual basis for his conclusion:

Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States.<sup>39</sup>

The first two cases that Justice Brandeis cited to support that conclusion were *Meyer v Nebraska*,<sup>40</sup> and *Pierce v Society of Sisters*.<sup>41</sup> Those, of course, are the two leading cases holding that certain fundamental rights that are neither enumerated nor expressly mentioned in the text of the Constitution are protected from substantive deprivation by state action. Thus, although it is familiar learning that so-called "enumerated rights"<sup>42</sup>—those specifically described in the first ten amendments to the Constitution—are incorporated in the Due Process Clause of the Fourteenth Amendment, we sometimes forget that the source of the doctrine of incorporation was the product of judicial evaluation of the fundamental character of the rights at stake rather than an analysis of the text of the Constitution itself.

Moreover, as the doctrine developed, the Court unequivocally rejected the position espoused by Justice Black that the boundaries of the idea of liberty are precisely measured by the contours of the first ten amendments. Contrary to the position Justice Black advanced in his dissent in *Adamson v California*,<sup>43</sup> the Court has neither incorporated all of the provisions of the Bill of Rights into the Fourteenth Amendment nor retreated from the position taken

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<sup>39</sup> Id at 373.

<sup>40</sup> 262 US 390, 400 (1923) (holding unconstitutional a state law prohibiting the teaching of foreign languages to children because the teacher's "right thus to teach and the right of parents to engage him so to instruct their children . . . are within the liberty of the [Fourteenth] Amendment").

<sup>41</sup> 268 US 510, 534-35 (1925) (holding unconstitutional a state law that forbade parents from sending their children to private schools because it "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control").

<sup>42</sup> See Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should Be Overruled*, 59 U Chi L Rev 381 (1992), for the argument that the distinction between enumerated and unenumerated rights is unstable.

<sup>43</sup> 332 US 46, 68 (1947) (Black dissenting).

in *Meyer* and *Pierce* that the concept of liberty includes unenumerated rights.

During the past century, while the relevant constitutional text has been as immutable as the Stonehenge monument, some of the propositions of law that the text identifies have changed significantly. Two guarantees in the Bill of Rights—one procedural and one substantive—illustrate this point.

1.

The Sixth Amendment provides that in all criminal prosecutions, the accused shall enjoy the right “to have the assistance of counsel for his defence.”<sup>44</sup> Unlike the English common law, which perversely limited the right to misdemeanor trials, the American right to counsel has always extended to more serious crimes.<sup>45</sup> Whether the Amendment merely guaranteed a lawyer to the defendant who could afford to hire one or also protected the indigent is a question that the text of the Amendment did not answer. It seems clear, however, that the early practice in federal as well as state courts did not require the appointment of counsel unless the defendant made a timely request for such assistance. A series of judicial decisions in this century has defined and expanded the right.

*Powell v Alabama*,<sup>46</sup> decided in 1932, was the groundbreaking case. Special circumstances creating an intolerable risk of unfairness in a capital case convinced a majority of the Court that the absence of counsel had made the trial fundamentally unfair.<sup>47</sup> A

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<sup>44</sup> US Const, Amend VI.

<sup>45</sup> *Powell v Alabama*, 287 US 45, 60-65, 69 (1932).

<sup>46</sup> 287 US 45.

<sup>47</sup> The Court concluded that given the special circumstances in the record, the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment. Whether this would be so in other criminal prosecutions, or under other circumstances, we need not determine. All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case. To hold otherwise would be to ignore the fundamental postulate, already adverted to, “that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.”

Id at 71-72, citing *Holden v Hardy*, 169 US 366, 389 (1898).

few years later, in *Johnson v Zerbst*,<sup>48</sup> the Court construed the Sixth Amendment to deprive federal courts in all criminal proceedings of the power to take away the defendant's liberty unless he has, or has waived, the assistance of counsel; the Court rejected the Solicitor General's argument that the failure to request counsel constituted such a waiver. The rule that was applied to state criminal prosecutions during the 1940s and 1950s required counsel in all capital cases, but not in noncapital cases unless special circumstances made the particular trial unfair.<sup>49</sup> In 1963, in *Gideon v Wainwright*, the Court overruled earlier decisions and dispensed with the "special circumstances" requirement, at least in felony cases.<sup>50</sup> More recently, the Court has extended the rule to lesser offenses;<sup>51</sup> it has also concluded that the Constitution mandates that counsel be competent.<sup>52</sup> The rule of law created by the last clause of the Sixth Amendment and the Liberty Clause of the Fourteenth Amendment has unquestionably changed while the text of those amendments has remained the same.

2.

So it is with the Religion Clauses of the First Amendment. Their application to the states was the product of judicial opinions that did little more than announce an interpretation of the idea of liberty that was self-evident to the Justices. The complete explanation of this conclusion appears in *Cantwell v Connecticut*:

We hold that the statute, as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment.

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<sup>48</sup> 304 US 458 (1938).

<sup>49</sup> See *Gideon v Wainwright*, 372 US 335, 350-51 (1963) (Harlan concurring).

<sup>50</sup> *Id.* at 344-45.

<sup>51</sup> See *Argersinger v Hamlin*, 407 US 25, 37 (1972) ("absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial") (footnote omitted).

<sup>52</sup> See, for example, *United States v Cronin*, 466 US 648, 656 (1984) (adversarial process protected by Sixth Amendment requires accused to have counsel acting as advocate); *Strickland v Washington*, 466 US 668, 687 (1984) (convicted defendant's claim of ineffective assistance of counsel requires showing that counsel's performance was deficient and that the deficiency prejudiced the defendant); see also *Cuyler v Sullivan*, 446 US 335, 348 (1980) (actual conflict of interest adversely affecting lawyer's performance renders assistance ineffective); *Holloway v Arkansas*, 435 US 475, 484 (1978) (Sixth Amendment right to effective assistance of counsel includes right of representation by attorney who does not owe conflicting duties to other defendants).



The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.<sup>53</sup>

History teaches us that these clauses were motivated by a concern about rivalry among Christian sects. The intolerance that characterized sixteenth- and seventeenth-century England—when royal decrees made martyrs of Edmund Campion and Thomas More, when Oliver Cromwell's puritan roundheads covered Renaissance art and literature with the austere blanket of censorship, and when English emigrants burned witches at the stake in Salem, Massachusetts—that intolerance was the product of competition among different groups sharing the same fundamental belief in the resurrection of Jesus Christ. In his *Commentaries on the Constitution*, Justice Story explained that the “real object of the [First] [A]mendment was not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government.”<sup>54</sup>

If the protection of the First Amendment were narrowly circumscribed by the specific concerns that motivated its adoption, presumably a democratic majority could discriminate against non-Christian religions, against agnostics, and against atheists. The Court, however, has unequivocally rejected that view because the principle of tolerance embodied in the First Amendment is broader than the particular history that was familiar to its authors.

Just as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism. But when the underlying principle has been examined in the crucible of litigation, the Court has unambigu-

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<sup>53</sup> 310 US 296, 303 (1940) (footnote omitted).

<sup>54</sup> Story, 3 *Commentaries on the Constitution* at § 991 (cited in note 34).

ously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.<sup>55</sup>

### III.

It is the principle of tolerance that, in time, must provide the answer to the controversy that inflames so many of our most sincere and zealous citizens. Fueling that controversy is a disagreement over the point at which a seed—to use St. Thomas Aquinas's term<sup>56</sup>—becomes a human being. In *Stanley v Georgia*,<sup>57</sup> and *Griswold v Connecticut*,<sup>58</sup> the Court implicitly determined that a potential father, as well as a pair of potential parents, has a constitutional right to waste the seeds of potential life. In *Skinner v Oklahoma ex rel. Williamson*, the Court held that the State could not sterilize the defendant and thus deprive him of "the right to have offspring," which is a "basic liberty," because he had committed two or more felonies.<sup>59</sup> In the *Cruzan* case two terms ago, the Court made it clear that the Liberty Clause protects a woman's right to make basic decisions about the physical treatment of her

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<sup>55</sup> *Wallace v Jaffree*, 472 US 38, 52-53 (1985) (footnote omitted).

<sup>56</sup> The view held by St. Thomas Aquinas is explained in a report prepared by the Congressional Research Service of the Library of Congress: "For St. Thomas, 'seed and what is not seed is determined by sensation and movement.' What is destroyed in abortion of the unformed fetus is seed, not man." Charles H. Whittier, *Catholic Teaching on Abortion: Its Origin and Later Development* (1981) (quoting *In octo libros politicorum* 7.12, attributed to St. Thomas Aquinas), reprinted in Brief of Americans United for Separation of Church and State as *Amicus Curiae* 17a, S Ct No 88-605 (Mar 30, 1989); see *Webster v Reproductive Health Services*, 492 US 490, 567-69 (1989) (Stevens concurring in part and dissenting in part); see also *Roe v Wade*, 410 US 113, 134 (1973).

<sup>57</sup> 394 US 557 (1969). *Stanley's* precise holding was, of course, that the "First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime." *Id* at 568 (footnote omitted). The Supreme Court reasoned that the Constitution protected the rights to receive ideas and to be free from unwanted governmental intrusions into one's privacy: "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch." *Id* at 565.

<sup>58</sup> 381 US 479 (1965) (holding Connecticut law prohibiting the purchase and use of contraceptives by married couples to be unconstitutional); see also *Eisenstadt v Baird*, 405 US 438 (1972) (holding Massachusetts statute prohibiting distribution of contraceptives to single persons to be unconstitutional under the Equal Protection Clause of the Fourteenth Amendment).

<sup>59</sup> 316 US 535, 536, 541 (1942). I recognize, of course, that the Court's opinion, written when the concept of "substantive due process" was in special disfavor, relied on an equal protection rationale. I believe this is one of several cases that is more appropriately explained as reflecting a judgment about individual liberty. See Stevens, *The Third Branch of Liberty*, 41 U Miami L Rev 277, 286, 288-89 (1986).

own body.<sup>60</sup> If a small tumor threatens her well-being, she has the right—a constitutionally protected right embedded in the Liberty Clause of the Fourteenth Amendment—to decide whether or not it shall be removed.<sup>61</sup> As a purely secular matter, if we regard a growth within her body that is no larger than an acorn as just a seed rather than a human being—as St. Thomas Aquinas did—the constitutional predicate for the decisions in *Stanley*, *Griswold*, and *Cruzan*, inexorably leads to the conclusion that the woman has a right to decide whether to waste or to preserve that seed.

That right, of course, is not absolute. Personal decisions involving the treatment of diseases, for example, must take into account the welfare of society.<sup>62</sup> But while the individual choice may be influenced, or even dictated, by the tenets of religious faith, the majority's decision to override such a decision must be justified by secular considerations. Many Americans are sincerely convinced that the duty to protect potential life after the moment of conception is just as imperative as it is immediately after birth, when a fetus becomes a person within the meaning of the Constitution. To the extent that such a conviction rests on religious faith rather than on physical differences between potential persons at different stages of their development, it does not provide a permissible basis for imposing the majority's will upon the individual.

The standard that should govern the judiciary in deciding whether a legislature had an adequate secular basis for interfering with an individual's decision respecting the disposition of a growth within or upon her body has been debated in a number of thought-provoking opinions.<sup>63</sup> Whatever standard may ultimately be ap-

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<sup>60</sup> *Cruzan v Director, Missouri Dept. of Health*, 110 S Ct 2841 (1990). Justice Scalia, however, did not accept this conclusion. See *id* at 2861-63 (Scalia concurring).

<sup>61</sup> "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault for which he is liable in damages." *Schloendorff v Society of New York Hospital*, 211 NY 125, 129-30, 105 NE 92, 93 (1914) (Cardozo).

<sup>62</sup> See *Jacobson v Massachusetts*, 197 US 11, 27-29 (1905) (balancing individual's liberty interest in declining unwanted smallpox vaccine against state's interest in preventing disease and upholding law because it was "of paramount necessity" to state's fight against epidemic).

<sup>63</sup> See, for example, *Thornburgh v American College of Obstetricians and Gynecologists*, 476 US 747, 795 (1986) (White dissenting) ("the state's interest, if compelling after viability, is equally compelling before viability," but "compelling" interest is not required for a right that is not fundamental); *Akron v Akron Center for Reproductive Health, Inc.*, 462 US 416, 453 (1983) (O'Connor dissenting) (regulation imposed on abortion is not unconstitutional unless it "unduly burdens the right to seek an abortion" at any point in the pregnancy); *Roe v Wade*, 410 US 113, 155, 163 (1973) (Blackmun) (where fundamental rights are concerned, state regulation may be justified only by a "compelling state inter-

plied in answering the legal questions the abortion controversy generates, the decisional process must recognize the validity of at least three settled propositions.

First, neither a seed nor a fetus is a "person" within the meaning of the Fourteenth Amendment.<sup>64</sup> The meaning of that term is unquestionably a matter of federal constitutional law that state legislatures cannot modify. Responsible critics of the decision in *Roe v Wade*—those who argue that every state should have broad latitude in regulating abortion—necessarily reject any suggestion that a fetus is a person prior to birth.<sup>65</sup>

Second, the justification for the legislative decision not only must be secular;<sup>66</sup> it also must be rational.<sup>67</sup> Theoretically, a prohi-

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est' " and must be "narrowly drawn to express only the legitimate state interests at stake"; the State's interest becomes "compelling" at viability); id at 170 (Stewart concurring) (right to abortion is "embraced within the personal liberty protected by the Due Process Clause of the Fourteenth Amendment" and any state interests in abridging this right must "survive the 'particularly careful scrutiny' that the Fourteenth Amendment here requires"); id at 173 (Rehnquist dissenting) ("The test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a rational relation to a valid state objective."); see also *Poe v Ullman*, 367 US 497, 543 (1961) (Harlan dissenting) ("[T]he full scope of the liberty guaranteed by the Due Process Clause . . . is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment"); *Griswold*, 381 US at 500 (Harlan concurring) ("the proper constitutional inquiry is whether . . . [the] statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values 'implicit in the concept of ordered liberty'"); *Moore v City of East Cleveland*, 431 US 494, 501-02 (1977) (Powell writing for the plurality); id at 542 (White dissenting).

<sup>64</sup> *Webster*, 492 US at 568 n 13 (Stevens concurring in part and dissenting in part); *Thornburgh*, 476 US at 779 n 8 (Stevens concurring).

<sup>65</sup> In his dissent in *Roe v Wade*, then Justice Rehnquist wrote,

I agree with the statement of Mr. Justice Stewart in his concurring opinion that the "liberty," against deprivation of which without due process the Fourteenth Amendment protects, embraces more than the rights found in the Bill of Rights. But that liberty is not guaranteed absolutely against deprivation, only against deprivation without due process of law. The test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a rational relation to a valid state objective. *Williamson v Lee Optical Co.*, 348 U.S. 483, 491 (1955). The Due Process Clause of the Fourteenth Amendment undoubtedly does place a limit, albeit a broad one, on legislative power to enact laws such as this. If the Texas statute were to prohibit an abortion even where the mother's life is in jeopardy, I have little doubt that such a statute would lack a rational relation to a valid state objective under the test stated in *Williamson*, *supra*.

410 US at 172-73 (Rehnquist dissenting).

<sup>66</sup> See *Webster*, 492 US at 568-69 (Stevens concurring in part and dissenting in part); see also *Cruzan*, 110 S Ct at 2888 (Stevens dissenting) ("It is not within the province of secular government to circumscribe the liberties of the people by regulations designed wholly for the purpose of establishing a sectarian definition of life."); *Hodgson v Minnesota*, 110 S Ct 2926, 2937 (1990) ("[T]he regulation of constitutionally protected decisions . . .

bition against abortion, like a prohibition against birth control, might be justified by a general interest in increasing the population of the community or the planet. Although such a justification might make a good deal of sense after a community has been devastated by war or plague, it would surely be irrational in urban America today.

Third, the constitutional issues that the abortion controversy generates cannot be entirely divorced from the topics under consideration in this comprehensive symposium on the Bill of Rights. For the Supreme Court decisions involving so-called unenumerated rights—such as the right to marry, the right to travel, the right to exercise dominion over one's body, and the right to decide whether to bear or to beget a child—make it clear that those rights have the same source as those that are enumerated in those parts of the Bill of Rights that are enforced against the states under the incorporation doctrine.

#### IV.

That source is the idea of liberty. Although that idea is difficult to define, the Court has given it meaning in specific cases and controversies. On the whole, the Court's decisions interpreting and reinterpreting the idea of liberty have enlarged the concept. For example, I have no doubt that the views expressed by Justice Holmes and Justice Brandeis in their separate opinions in *Gitlow v New York*,<sup>68</sup> and *Whitney v California*,<sup>69</sup> though then unacceptable to the majority, are now part of our law. The right to marry a person of a different race,<sup>70</sup> or a person incarcerated in a different

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must be predicated on legitimate state concerns other than disagreement with the choice the individual has made. . . . Otherwise, the interest in liberty protected by the Due Process Clause would be a nullity.”).

<sup>67</sup> See *Meyer*, 262 US at 399-400 (“liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect”); *Pierce*, 268 US at 535 (“rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State”); *Thornburgh*, 476 US at 789 (White dissenting) (“State action impinging on individual interests need only be rational to survive scrutiny under the Due Process Clause, and the determination of rationality is to be made with a heavy dose of deference to the policy choices of the legislature.”).

<sup>68</sup> See note 37 and accompanying text.

<sup>69</sup> See note 38 and accompanying text.

<sup>70</sup> See *Loving v Virginia*, 388 US 1, 12 (1967) (“The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations.”).

prison,<sup>71</sup> though unmentioned in the text of the Constitution, is now protected by unanimous holdings of the Supreme Court. The general trend of these decisions raises two questions that are far more important than the wisdom or lack of wisdom of any particular holding. Do they represent progress toward the constitutional goal of forming a more perfect union? If so, has that progress been attained by legitimate means?

The answer to the first question does not depend on the means by which the change has been accomplished. It would be the same if every addition to the concept of liberty that judicial decision has produced had instead been achieved by the cumbersome process of amending the text of the Constitution. If that procedure had been followed, would we have a more perfect union today than we had in 1791? Mortimer Adler has recently suggested how that question should be answered.

Although I do not endorse his suggestion that the Court should wield the power to invalidate unjust legislation even if it is not unconstitutional, he is persuasive when he argues that one's views about a just society will determine whether a change in the law represents progress. Commenting on Judge Bork's confirmation hearings, Dr. Adler wrote:

The nominee might even have been asked whether he thought the eighteenth-century Constitution, allowing as it did for the disenfranchisement of women, blacks, and the poor who could not pay poll taxes, was or was not unjust. If he said that no objectively valid principles of justice enabled him to answer that question, he might still have been asked on what grounds the thirteenth, fourteenth, fifteenth, nineteenth, and twenty-fourth amendments were adopted in subsequent years and whether they represented progress in the direction of social justice, regression, or neither?<sup>72</sup>

In my judgment, no matter how one defines the "just society" or the "perfect union" mentioned in the Preamble to the Constitution, it is appropriate to characterize the amendments identified by Dr. Adler as well as the trend of decisions that I have identified above as progress.

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<sup>71</sup> *Turner v Safley*, 482 US 78, 99-100 (1987) (state regulation banning marriages among inmates without supervisor's approval violates the Fourteenth Amendment).

<sup>72</sup> Mortimer Adler, *Robert Bork: The Lessons to Be Learned*, 84 Nw U L Rev 1121, 1123 (1990).

I am also convinced that the progress in the development of our constitutional law has been achieved by legitimate means. The risk of unwise decisions is always present, and that concern is greatest when the Court concludes that the strong presumption of validity that attaches to decisions made by the elected representatives of the majority has been overcome.<sup>73</sup> Moreover, just as risk is a characteristic of a free economic market, so also may every expansion of individual liberty pose some additional danger for society. But risk—even serious risk—is part of the price that must be paid for freedom.

Unlike their French counterparts, the Framers of our Constitution wisely refused to stake the fate of the nation on the will of the transient majority. With equal wisdom they made no attempt to fashion a Napoleonic Code that would provide detailed answers to the many questions that would inevitably confront future generations.<sup>74</sup> Instead, they used general language to construct a framework allocating decisionmaking powers among different branches of government. The provisions for the appointment and life tenure of federal judges were obviously designed to enable them to perform their professional tasks impartially, without fear of popular disapproval. Their duty to adjudicate cases and controversies obviously encompasses an obligation to interpret the text of the Constitution. As Justice Cardozo reminded us, "this power of interpretation must be lodged somewhere, and the custom of the constitution has lodged it in the judges. If they are to fulfill their function as judges, it could hardly be lodged elsewhere."<sup>75</sup> I firmly believe that the Framers of the Constitution expected and intended the vast open spaces in our charter of government to be filled not only by legislative enactment but also by the common-

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<sup>73</sup> As Justice Powell observed in *Moore v City of East Cleveland*, "[t]here are risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights." 431 US 494, 502 (1977). Even against the backdrop of *Lochner*, however, he concluded that although "history counsels caution and restraint . . . it does not counsel abandonment . . ." *Id.*

<sup>74</sup> Gerhard Casper has noted:

[T]he [Napoleonic] Code in many crucial provisions uses language whose level of generality is not much distinguishable from that of the Constitution. This is one reason why the code has lasted for almost 200 years. Many of its provisions are incomprehensible unless you consult the gloss put on them by French courts.

Letter from Gerhard Casper, Provost, The University of Chicago, to the author (Jan 20, 1992). In light of Casper's observation, perhaps my reference should have been to the Internal Revenue Code rather than the Napoleonic Code.

<sup>75</sup> Benjamin Cardozo, *The Nature of the Judicial Process* 135-36 (Yale, 1921).

law process of step-by-step adjudication<sup>76</sup> that was largely responsible for the development of the law at the time this nation was conceived.<sup>77</sup> That process has largely eliminated the use of coerced confessions in criminal trials, curtailed racial discrimination in the selection of juries, and extended First Amendment protection to artistic expression as well as to political speech.

Disagreement with a particular decision does not justify an attack on the entire decisional process. Judgments that apply principles that are embedded in the Constitution, that are supported by a candid attempt to explain the application of the principle and the relevance of prior decisions, represent appropriate developments of the law even when neither text nor history supplies the entire basis for the new decision. The work of federal judges from the days of John Marshall to the present, like the work of the English common-law judges, sometimes requires the exercise of judgment<sup>78</sup>—a faculty that inevitably calls into play notions of justice, fairness, and concern about the future impact of a decision. The fact that such concerns play a role in the decisional process does

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<sup>76</sup> Cardozo's description of the judge's task in statutory construction is equally appropriate in describing the judge's task in constitutional interpretation:

There are gaps to be filled. There are doubts and ambiguities to be cleared. There are hardships and wrongs to be mitigated if not avoided. Interpretation is often spoken of as if it were nothing but the search and the discovery of a meaning which, however obscure and latent, had none the less a real and ascertainable pre-existence in the legislator's mind. The process is, indeed that at times, but it is often something more.

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Interpretation, thus enlarged, becomes more than the ascertainment of the meaning and intent of lawmakers whose collective will has been declared. It supplements the declaration, and fills the vacant spaces, by the same processes and methods that have built up the customary law.

Id at 14-15, 17.

<sup>77</sup> "Originalism was not the original interpretive doctrine of the framers nor of the framing generation. It was taken for granted that the Constitution, like other legal texts, would be interpreted by men who were learned in the law, arguing cases and writing judgments in the way lawyers and judges had done for centuries in England and its colonies." Charles Fried, *Order and Law: Arguing the Reagan Revolution—A Firsthand Account* 66 (Simon & Schuster, 1991) (footnote omitted).

For an account of the interpretive techniques used in the Framers' day, see H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv L Rev 885 (1985) (arguing that approaches to constitutional interpretation in the Framers' day differ from the approach now taken by those who say we should look to the Framers' intent). There has, of course, been a lively scholarly debate about Powell's view. See, for example, Raoul Berger, "Original Intention" in *Historical Perspective*, 54 Geo Wash L Rev 296 (1986) (challenging Powell's claims).

<sup>78</sup> Justice Harlan's advice to those engaged in the difficult task of defining due process is equally apt to those engaged in the difficult task of judging: "No formula could serve as a substitute . . . for judgment and restraint." *Poe v Ullman*, 367 US 497, 542 (1961) (Harlan dissenting).



not undermine the legitimacy of the process that, for the most part, has served the nation well for two centuries.

## V.

Progress in the development of the law, to borrow again from Justice Cardozo:

is neither a straight line nor a curve. It is a series of dots and dashes. Progress comes *per saltum*, by successive compromises between extremes, compromises often, if I may borrow Professor Cohen's phrase, between "positivism and idealism." "The notion that a jurist can dispense with any consideration as to what the law ought to be arises from the fiction that the law is a complete and closed system, and that judges and jurists are mere automata to record its will or phonographs to pronounce its provisions." Ideas of justice will no more submit to be "banished from the theory of law" than "from its administration."<sup>79</sup>

An important protection against the unwise use of the judicial power to interpret the Constitution has its origin in common-law jurisprudence. Judges have always attached less importance to dicta than to the portions of an opinion that are necessary to explain a judgment. The doctrine of judicial restraint, which counsels against the use of unnecessary dicta, also imposes on federal judges the obligation to avoid unnecessary or unduly expansive constitutional adjudication.<sup>80</sup> Justice Brandeis is the author of the leading opinion expounding this doctrine—*Ashwander v Tennessee Valley Authority*<sup>81</sup>—as well as some of the Court's most inspiring words about the idea of liberty. I quote three sentences from his opinion in *Whitney v California* to illustrate the latter point:

Those who won our independence believed that the final end of the State was to make men free to develop their faculties;

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<sup>79</sup> Benjamin N. Cardozo, *The Paradoxes of Legal Science* 26-27 (Columbia, 1927) (footnotes omitted).

<sup>80</sup> "The doctrine teaches judges to focus their attention on the issue that must be addressed in order to decide the case or controversy between the specific litigants before the Court." Stevens, *Judicial Restraint*, 22 San Diego L Rev 437, 446 (1985).

<sup>81</sup> 297 US 288, 346 (1936) (Brandeis concurring) ("The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.'") (quoting *Liverpool, New York and Philadelphia S.S. Co. v Commissioners of Emigration*, 113 US 33, 39 (1885)); see also *Burton v United States*, 196 US 283, 295 (1905) ("It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.").

and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty.<sup>82</sup>

In response to Abraham Lincoln's call for "a new birth of freedom" in his Gettysburg Address,<sup>83</sup> the second century of the history of the Bill of Rights witnessed significant progressive change in the idea of liberty. Historical and textual analyses have played an important role during that century of progress, but they did not limit absolutely the Court's exercise of judgment in performing its task of interpreting the underlying meaning of a dynamic concept. Let us hope that the inability to decipher the actual intent of the architects of the Constitution—like the inability to decipher the Stonehenge text—will not prevent the exercise of sound judgment from continuing the progressive development of the idea of liberty during the third century of the life of the Bill of Rights.

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<sup>82</sup> 274 US at 375 (Brandeis concurring).

<sup>83</sup> Quoted in Commager, ed, 1 *Documents* at 429 (cited in note 31).

## EXCHANGES

